

Water Rights and No Compensation ^{1/}

The earth belongs in usufruct to the living, not to spoil it for future generations. The present generation has the same right over the lands and resources as the preceding generation and the next generation. Using the environment for a limited time without damaging or diminishing its value for future generations is the meaning of usufruct.

Summarized from the September 6, 1789 letter Thomas Jefferson wrote to James Adam describing the fundamental principle of usufruct that every government and the people should understand.

The State of California owns all the waters of the state. These waters are held as a public trust for the benefit of the people (The U.S. Constitution, the California Constitution and California Water Code.) This held in trust is a property right held by and for the people. The State Water Resources Control Board (State Board) is the allocator of such water resources. The water rights allocated / granted by the State Board carry public trust and usufruct restrictions / obligations. As such the State Board must act as a peoples' trustee in its water planning, water right allocations and oversight activities (Racanelli -1986). The State Board as a part of its continuous oversight activities must enforce the public trust and usufruct restrictions associated with each water right allocation granted and associated use activities. The American Heritage Dictionary describes the "usufruct" restriction as "the right to utilize and enjoy the use of some thing belonging to another (in this situation - water) as long as the property (the water) is not damaged or altered in any way" (think contamination from mining waste runoff, agricultural chemicals, drainage and thermal accumulation).

California's annual water supply (runoff) is extremely variable from year to year and seasonally. Each water right allocation is burdened with usufruct and Public Trust restrictions to protect the greater public interest. Even with such restrictions and variable water supply, water allocations / water right permits have been granted by the State Board to the extent that some rivers and stream are over appropriated on an annual basis or during some months of the year. The water right / appropriation system requires that water be put to a beneficial use. The term "beneficial use" meaning beneficial to the appropriator and not harmful to public trust interests attached to water. Beneficial use is the measure and limit of water use. The reasonable use doctrine limits every water right in California (State Board Order WR-95-4). (Also see Racanelli -1986.)

History indicates that when someone wanted more water, he or she went to the State Board, filed an application for the desired water, and after a review, received a water right allocation. This usually resulted in another river dammed, another diversion facility, pumps or pipes installed to take the desired water. All water right holders have a duty to comply with state laws designed to protect the peoples' fish, other aquatic resources, public trust interests and the usufruct aspect of the water use relative to the growing awareness of impacts to aquatic ecosystems, the purpose and intent of Fish and Game Code Section 5937 and the Federal and California's Endangered Species Acts.

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The Public Trust

The key case regarding the allocation of public trust interests was about 125 years ago in Illinois Central RR v. State of Illinois (146 US 387-1892). The U.S. Supreme Court ruled that while it may be reasonable for the State of Illinois to grant some of the Chicago water - front, the waters of and lands underlying Lake Michigan to the Illinois Central RR for some purposes allied with the public trust, this massive giveaway of the Chicago waterfront, waters and its submerged lands to a private railroad for its private use and capital gain was illegal. The U.S. Supreme Court held that the State of Illinois did not have the authority to make such a massive grant of public resources (shorelands, bed and waters of Lake Michigan) and other interests held in trust. The U.S. Supreme Court relied on the Public Trust Doctrine to limit the authority of the Illinois State legislature.

Applying the public trust principle of Illinois Central to the allocation of water, suggests that when a vast amount of water are allocated by the State which results in a river being greatly reduced, nearly dewatered, or an aquatic ecosystem degraded (quality degraded by chemicals, thermal pollution and salt water intrusion) with associated resources, uses and values destroyed, the allocation would be unreasonable, and therefore illegal. The reasoning of Illinois Central provides support for the State Board can only issue permits to appropriate an amount of water that does not abrogate its public trust duties and responsibilities. If public trust interests have been degraded or destroyed (water / environmental quality), the water needed to conserve and protect fish, other aquatic life and other interests covered by the public trust was not transferred because it never was transferable (Robie-1977). Following Robie's reasoning, there is no beneficial use tied to that amount of water because it was not transferable. To say it another way the State Board may allocate only those amounts of water that are above that needed to protect and perpetuate trust resources, uses and values. The State Board can use its regulatory powers and the Public Trust Doctrine to curtail excess diversion or use and activities not consistent with the usufruct restriction.

The Public Trust Doctrine, when used to protect flowing aquatic ecosystems from the impacts of water appropriation and unreasonable use of water, is based on some modest beliefs. These are (1) a belief that the public benefits from private development, but that the public interest is greater than the sum of the private interests; (2) a belief that property rights in water, like rights on land, are not absolute but must be regulated and controlled for the good of the people; (3) a belief that waste and unreasonable uses of public resources are wrong and are not excused by flows returning to our rivers and streams that contain salts and trace elements (selenium), silt, agricultural chemicals and thermal accumulation that impact water quality; (4) a belief that our wetlands, lakes, rivers and streams with their meandering waterways are more than commodities, they are a sacred trust; (5) that the fish and other aquatic resources of our rivers and streams are part of this sacred trust; and (6) a belief that the words "public trust" and "held in trust" should be taken seriously for the health and well being of all the people and future generations (Wilkinson-1989).

Enforcement of the Public Trust and Usufructary Restrictions

Public Trust Doctrine and the usufructary restrictions must be recognized as constraints on the allocation and use of water rights. However expectations of water right

holders have grown to demand and to expect more water from more dams with little commensurate concerns for widespread impacts to instream and out-of-stream interests protected by the public trust or the usufructuary restrictions.

Court decisions have given great focus and recognition to public trust interests, such as instream flows and impacts to associated fish resources. Court decisions in Marks v. Whitney (6 Cal.3d251-1970), National Audubon Society v. Superior Court, 33 Cal 3d 419 - 1983), Cal. Trout v. SWRCB, 207 Cal App3d 585-1989, also called Cal Trout 1) and Cal Trout v. Superior Court (218 Cal App3d 187 – 1990, also called Cal Trout II) and the Delta Decision (US v. SWRCB, (227 Cal Pt at 161-1986, also called Racanelli) are main stream public trust doctrine decisions. The National Audubon Court decision set the standard for protecting trust interests. The National Audubon Court tied public trust protection to the maintenance and renewability of trust resources, uses and natural values for their innate value to society, not to private beneficial uses of water at a distant location (Koehler-1995).

The State Board has used the Public Trust in the courts and in Amicus Curie briefs on behalf of trustee agencies and the people. In Reynolds v. City of Calistoga, the State Attorney General filed an Amicus Curiae October 2013, to help protect steelhead trout from the affects of Kimball Creek Dam operations on the Napa River by action of the City of Calistoga. In the Russian River Basin it was Light v. State Water Resources Control Board (173 Cal Rptr 3d 200, July 2014) involving unreasonable use where pumping dried up tributaries to the Russian River impacting young salmon and steelhead. In the Scott River Basin it was Environmental Law Foundation, et al. v. State Water Resources Control Board, et al. (Superior Court of California, County of Sacramento, Case No. 34-2010 – 80000583, Filed July 15, 2014), regarding the connection between surface and ground water, where pumping dewatered portions of Scott River in Siskiyou County, impacting young salmon and steelhead. In these case the public trust doctrine played a pivotal role in the decisions.

Rule of No Compensation

There is a right of way for the public to use a river or other body of water for navigation purposes despite any private ownership there may be of the bed or bank. This is based on the Federal jurisdiction over navigation under the Commerce clause of the Constitution. The navigation servitude holds that in support of navigation, the United States can oust any conflicting ownership, interest or use from navigable waters without paying compensation (emphasis added - Morreale-1963). Such thinking can be applied to unauthorized water diversion, point and non-point pollution, unreasonable diversion (structures) and unreasonable use of water, all of which can impact trust interests and beneficial use of water. The State using the public trust doctrine, can withdraw or cancel all or part of a water right allocation. This would follow the no compensation rule of the Federal navigation powers regarding ousting conflicting uses. Ouster can be accomplished by the State using its regulatory powers or the public trust doctrine without becoming derailed by the taking issue (Johnson 1989). So that today, the no compensation rule could extend to all allocations of water affecting state waters whether navigable or not, whether or not they support a fishery, such as the tributaries to Mono Lake, or discharge of drainage to the San Joaquin River.

Water right holders or users of water do not acquire a property right by their past history of water use or by its disposal. If a water use is found to be unreasonable, the water right associated with such use can be taken without compensation. An example of such use, is the continued irrigation of saline seleniferous soils of the San Luis Unit of the Central Valley Project and the resultant drainage from water supplied by the Bureau of Reclamation. The water rights associated with such a use could be taken without compensation and returned to the area or origin. If a diversion of water is found to be unreasonable and against the perpetuation of trust resources and interests, the water rights associated with such a diversion can be taken without compensation. Following Mr. Ron Robie's reasoning, if additional water is needed to protect and recover Endangered Species Act (ESA) listed species, the Public Trust Doctrine could be used to withdraw from allocation the desired water to provide the environmental conditions necessary to support such ESA listed species because the water needed for that effort was never transferred (Robie – 1977).

Trustee responsibilities and the taking issue was reviewed by the California Supreme Court in National Audubon. The Court discussed Mallon v City of Long Beach (1955) 44 Cal. 2d 199, 282 P. 2d 481; Colberg, Inc. v State of California 67 Cal. 2d, 408, 62 Cal. Rpt. 401, 432 P.2d 3; City of Berkeley v Superior Court 26 Cal. 3d 515, 162 Cal. Rpt 327, 606 P.2d, 362. The Audubon Court explicitly addressed the issue of taking and did not find a taking. California Courts have restated the California Fish language:

Once again we reject the claim that establishment of the public trust constituted a taking of property for which compensation was required:

We do not divest anyone of title to property: the consequence of our decision will be only that some landowner whose predecessors in interest acquired property under the 1870 act will, like the grantees in California Fish hold it subject to the public trust (189 Cal. Rpt. 346 at 360-1913).

It is clear from California Fish that protecting public trust interests in the State's fishes is a property interest of the people. Protecting the public trust is a pre-condition of any allocation of a water right and is a usufruct. The water / stream flow and the aquatic environment necessary to protect or help the recovery of anadromous species on the Federal Endangered Species Act and the California's Endangered Species Act was never transferred.

Northern California, Sacramento Valley and Delta residents in the 1930s and 40s were assured that only water "surplus to the needs of the Sacramento Valley and Delta" would be exported to the San Joaquin Valley. State laws passed (Water Code 11460 - 11463) give strength to those assurances. The San Joaquin Valley exchange contractors get first priority to Sacramento Valley water; other croplands are at a lower priority and get supplemental water. A typical Reclamation 9(e) irrigation contract provides for the United States to furnish a supplemental water supply... The contract clarifies that the United States is not liable for water shortages caused by operator error, drought, water rights permit / license conditions, applicable state and federal laws. The more junior the water contract the more likely the amount of water deliverable will be less than the desired maximum (CVP Authorizing Documents, 1957, pg. 107-115.) All Reclamation contractors should be aware of the above conditions..

The State Board can apply the public trust doctrine to; (1) virtually all surface water courses; 2) all holders of water rights, i.e. pre and post 1914 appropriators, riparian and contract users; 3) review the impacts of the diversion of water on the entire aquatic ecosystem aspects (stream bed, shore land water interface, riparian vegetation, water quality, all aquatic life, etc.); 4) consider the impacts of all diverters and can apportion the obligation to protect trust uses to all diverters on the water course or courses in question; and 5) can develop imaginative physical solution involving flow and non-flow aspects. It is State Water Board policy to enforce Fish and Game Code Section 5937 to pre-1914 water rights and protect Endangered Species Act listed species (State Board Order WR-95-4).

If a court or the State Board invokes the Public Trust Doctrine, Area of Origin Protection to recover instream flows to protect fish species (ESA listed species) via altering a water right allocation or if it affects a contract, it is entirely reasonable that the rule of no compensation would apply. This is based on the theory that there can be no superior private ownership rights to water in a stream since the sovereign already owns the water and the water needed was never transferable.

Action Needed

Using the American River Basin (ARB) as an example, some people believe that operating under FERC licenses shields Upper American River Basin reservoirs from any mitigation obligations to protect the public trust / fisheries, uses and values downstream of Folsom / Nimbus facilities. Up to 785,000 AF of storage and managed inflow could be involved at facilities owned by Placer County Water Agency, Pacific Gas and Electric Company, Sacramento Municipal Utility District and El Dorado Power Authority. The water that fills and refills the Upper ARB reservoirs was available to Reclamation from 1955 through the mid 1960s to help manage Folsom Reservoir and the lower American River. Each Upper ARB reservoir, in its own way, short stops runoff until each reservoir has reached operating capacity. Any minimum flow releases are usually replaced by inflow in most years and have little impact on Folsom Reservoir operations. In most years Upper ARB reservoirs collectively have more water in storage at the end of August than Reclamation has in Folsom Reservoir.

Reclamation has partial responsible for maintaining Delta water quality via releases from Folsom and Shasta Reservoirs. However each of the upper American River Basin reservoirs should be partly responsible for maintaining and protecting trust resources, such as Chinook salmon and steelhead trout resources in the lower American River. Each of these upper ARB reservoirs should be responsible for contributing a portion of their water right allocation to be stored Folsom Reservoir and later released to the American River for fish resource mitigation, fish species recovery and conservation purposes. The State Board, under its continuous Public Trust responsibilities can review past water right allocations and can modify them at any time to facilitate such releases or contributions of water.

The annual unimpaired discharge of the American River at Fair Oaks USGS Gage is estimated at 2,620,724 acre-feet. In 2014, Grantham and Viers estimated that there are 3,358,904 acre-feet of water rights granted from the American River, exclusive of hydro-power water rights. Therefore the AR Basin runoff is over subscribed by about 750,000 AF annually. There is not enough water for all interests to take the water each was allocated on an annual

basis. If everybody took their water there would be inadequate flow in some parts of the AR Basin to protect fish resources and other trust interests. There would be inadequate flows and environmental conditions in the lower American River to protect Chinook salmon, help the recovery of ESA listed Steelhead trout and protect other trust interests.

This over allocation is going to force AR Basin water right holders to develop priorities, address water supply uncertainties consistent with public trust and usufruct restrictions. The public trust doctrine protection of trust assets would hold an exalted position in any judicial or administrative determination of water allocation that may occur (Moskovitz - 1994). AR Basin public and stakeholders must decide if AR Basin water resources are going to benefit local urban and resource needs, or if water purveyors are going to be allowed to sell water to the highest bidder in some other part of the State regardless of local resources and urban needs.

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